IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

THURSDAY, THE 13TH SEPTEMBER 2007 / 22ND BHADRA 1929

WP(C).No. 27308 of 2007(A)

OS.531/2006 of PRINCIPAL SUB COURT,ERNAKULAM
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PETITIONERS:
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1. R.RATHEESH, AGED 44, S/O.RAGHAVAN,
THURUTHIPARAMBIL HOUSE, PULLAR DESOM ROAD,
PALLURUTHY, RAMESWARAM VILLAGE,
KOCHI TALUK - 682 006.

2. V.B.KISHORE, AGED 46, S/O.DHARMARAJAN,
VADAKKEDATH HOUSE, AZAD ROAD, KALOOR DESOM,
ELAMKULAM VILLAGE, KANAYANNOOR TALUK.

BY ADV. SRI.V.RAJENDRAN (PERUMBAVOOR)
SRI.GEORGE VARGHESE KIZHAKKAMBALAM

RESPONDENT:

JASEENTHA, AGED 52, D/O.ABRAHAM,
VALIYAPADATH HOUSE, THRIKKANARVATTOM DESOM,
ERNAKULAM VILLAGE, KANAYANNOOR TALUK.

BY

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 13/09/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

M.N.KRISHNAN, J

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W.P.(C) No.27308 OF 2007

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Dated this the 13th day of September 2007

JUDGMENT

This writ petition is filed to set aside Ext.P6 order whereby the learned Sub Judge, Ernakulam dismissed the application for issuance of a Commission on the ground that there is no question of identification. Learned counsel had taken me through the pleadings of the parties as well as the agreement. The suit is one for specific performance of a contract whereby the defendant has agreed to sell the property at Rs.5,000/- per cent. As per the agreement there is a stipulation regarding the measurement of the property as well. The defendant would contend that the time has expired, and that time is the essence of the contract and therefore the agreement is unenforceable. He had also contended that at the instance of the plaintiffs themselves, on an earlier occasion the property has been measured by the Taluk Surveyor. Whatever it may be, then the point to be adjudicated in the suit is of course the entitlement of the plaintiffs to get a decree for specific performance. I am also conscious of the fact that the readiness and willingness and the contention whether time alone is the essence of the

contract are all matters which have to be looked into in detail by the court below. But, if ultimately the court finds that the plaintiffs are entitled to a decree for specific performance, then as per the terms of the agreement the consideration has to be fixed basing upon the total centage value of the property at the rate of Rs.5,000/- per cent.

Therefore, instead of postponing to the matter, it is only just and equitable to issue a Commission to measure the property and get the actual extent of the property, i.e. to be sold in case of a decree for specific performance. Therefore the order under challenge is set aside and the court below is directed to issue a Commission for specific performance and needless to say that if the defendant wants to note any further particulars she may also file a work memo before the Commission.

Writ petition is disposed of as above.

M.N.KRISHNAN, JUDGE

Cdp/-